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IN THE SUPREME COURT OF THE STATE OF IDAHO

MICHAEL KOCH,	)	
	)	
Plaintiff-Appellant,	)	**NO. 43856**
	)	
v.	)	**Ada Co. CV-PC-2015-15545**
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE CHERI C. COPSEY
District Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

STATEMENT OF THE CASE

Nature of the Case

Petitioner appeals from the summary dismissal of his pro se petition for post-conviction relief.

First, the pro se Petitioner did not get his full 20 days to respond to the notice of intent to dismiss. The court had oral argument just prior to the end of the period and advised it was taking it under advisement and would issue a written decision. Also, the court did not respond to the pro se Petitioner's inquiry at the hearing about whether he had more time. Since Petitioner did not receive the statutorily required time, the summary dismissal must be reversed.

Second, assuming arguendo that the notice issue above is not dispositive, the court erred by summarily dismissing the ineffective assistance of counsel issue regarding counsel's failure to bring a motion to suppress the search warrant of Petitioner's house. As Petitioner explained, there was no valid search warrant because it was issued November 11, 2011, but the search took place ten days earlier, on November 1, 2011. Thus, the evidence should have been suppressed as well as the interviews and evidence that were fruit of the poisonous tree.

While the court ultimately ruled that this claim was bare and conclusory, there was actually no evidence disputing what Mr. Koch explained, so the court should have had an evidentiary hearing on the issue and required the state to produce a valid search warrant if one exists.

Statement of the Facts and Course of Proceedings

The Supreme Court succinctly described the underlying criminal case in its published opinion in the direct appeal in State v. *Koch*, 157 Idaho 89 (2014) affirming the case:

> A grand jury indicted Koch on four counts of lewd conduct with a minor under sixteen on November 15, 2011, with "C.C." named as the complaining witness in all counts. Count I alleged the crime was committed "by manual to genital and/or oral to genital contact" between January and May 2011. Counts II, III, and IV all alleged genital to genital contact in April 2011.
>
> Koch's daughter, T.K., was a classmate and friend of thirteen-year-old C.C. During her eighth grade year, C.C. spent increasing amounts of time at the Kochs' home as she began to have problems at home.
>
> At Koch's trial, C.C. testified that in the spring of 2011 Koch drove her to a street alongside a subdivision where he digitally penetrated her and she performed oral sex on him. C.C. testified that they engaged in sexual intercourse on three occasions at his house when his wife and daughter were out. C.C. testified that she did not disclose her relationship with Koch until the fall of 2011, when she was admitted to Intermountain Hospital following a suicide attempt.
>
> The State played an audio recording of a confrontation call officers had arranged between C.C. and Koch. In the recorded call, C.C. confronted Koch about their sexual relationship. In the course of the call, Koch did not expressly admit sexual contact with C.C., but also did not refute C.C.'s accusations. He expressed his love for C.C. and his fear that he was going to jail.
>
> Following trial, the jury found Koch guilty on all four counts. The district court imposed concurrent unified 25-year sentences, with five years fixed, on each count. Koch timely appealed from his judgment of conviction.

Id. at p. 92-93.

Mr. Koch timely filed a pro se form verified petition for post-conviction relief along with a sworn statement of facts. (R. p. 3-11.)

The grounds for the petition were ineffective assistance of counsel. Specifically, Petitioner alleged:

1. His trial counsel failed to prepare or present any defense;
2. His trial counsel failed to present expert testimony;
3. His trial counsel failed to allow him to read pertinent documents or the grand jury transcript;
4. His trial counsel failed to spend sufficient time with him to build a defense;
5. Trial counsel failed to raise questions regarding the validity of the search warrant dated 11/11/11.
6. Trial counsel failed to file an adequate Rule 35 motion to reconsider.

Petition and Affidavit for Post-Conviction Relief, page 2. (R. p. 4.)

The state filed an answer. (R. p. 13-14.) The state then brought a combined Motion for Summary Disposition & Admission of Exhibits. (R. p. 15-16.) The exhibit was the trial transcript, of which the court later took judicial notice. (R. p. 17-335; p. 353.) The state also filed a brief in support of its motion. (R. p. 336-344.)

On October 6, 2015, the court filed its Order Denying Appointment of Counsel. (R. p. 345-349.) The Order stated that Mr. Koch filed his Petition pro se and requested counsel appointed at public expense, but failed to support his request with any evidence regarding his ability to pay for his own attorney. (R. p. 345.) Actually, Mr. Koch had not requested that counsel be appointed, and no such request appears in the record.

On October 19, 2015, a "Notice of Status" was issued by the court clerk setting this matter for "Status" on November 16, 2015, at 2:45 PM. (R. p. 350.) That same day an "Amended Notice of Hearing" was issued by the court clerk setting this matter for "Oral Argument" on November 16, 2015, at 2:00 PM. (R. 351.)

On October 27, 2015, the court gave its notice of intent to dismiss because it considered other grounds as well those posited by the state. (R. p. 353-361.) The conditional dismissal instructed that Petitioner may reply to the proposed dismissal within 20 days. (R. p. 353-354.) The certificate of service indicates it was mailed to Mr. Koch on October 28, 2015. (R. p. 361.)

A hearing was held on November 16, 2015. (R. p. 362.)

On November 19, 2015, the court issued its Order Dismissing Petition. (R. p 363-371.) A separate judgment was entered. (R. p. 372-373.)

Petitioner timely appeals. (R. p. 374-376.)

ISSUE

Whether the district court erred by summarily dismissing the petition for post-conviction relief

ARGUMENT

The District Court Erred by Summarily Dismissing the Petition for Post-Conviction Relief

A. Standard of Review at Trial and on Appeal

An application for post-conviction relief under Idaho Code § 19-4901 is civil in nature and is an entirely new proceeding distinct from the criminal action which led to the conviction. *Nguyen v. State*, 126 Idaho 494 (Ct.App. 1994). In order to prevail in a post-conviction proceeding, the applicant must prove, by a preponderance of the evidence, the allegations upon which the request for post-conviction relief is based. *Id.*

Summary disposition is the procedural equivalent of summary judgment under I.R.C.P. 56, with the facts construed and all reasonable inferences made in the light most favorable to the non-moving party. *Gonzales v. State*, 120 Idaho 759 (Ct.App. 1991). Allegations contained in the verified petition are deemed true for the purpose of determining whether an evidentiary hearing should be held. *Martinez v. State*, 125 Idaho 844 (Ct.App. 1994). If the allegations do not frame a genuine issue of material fact, the court may grant a motion to summarily dismiss, but if the application raises material issues of fact, the district court must conduct an evidentiary hearing. *Id.*

In determining whether a motion for summary disposition was properly granted, the appellate court reviews the facts in the light most favorable to petitioner and determines whether, if true, they would entitle petitioner to relief. *Saykhamchone v. State*, 127 Idaho 319 (1995).

B. Standard of Review Regarding a Claim of Ineffective Assistance of Counsel

The standard for evaluating a claim of ineffective assistance of counsel is well established, being set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

Strickland set forth a two-prong test which a defendant must satisfy in order to be entitled to relief. The defendant must demonstrate both that his counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.* at 687-88; *State v. Charboneau*, 116 Idaho 129 (1989); *Gibson v. State*, 110 Idaho 631 (1986).

C. The Claims and the Court's Rulings

The Affidavit of Facts in Support of Post-Conviction Petition stated as follows:

> I held conversations with my attorney and was advised to bring expert witness to trial for testimony. The Attorney was Authorized to bring as many as was needed forward and he failed to produce even one.
>
> I was never given the opportunity to read reports and analogies and spent very little time with my attorney to build a defense or prepare for taking the stand.
>
> My attorney was asked to and he never did bring into question the validity of the search warrant or the indiscrepancies of the search warrant dated 11-11-11.

> Counsel never allowed me to read grand jury transcripts so they could be objected to or challenged I never got to read all or see all evidence that was presented against me at trial.
>
> Counsel prepared an inadequate Rule 35 leading to Judge denying it due to Attorney not present the evidence and Judges Ruling says he did not do his job.

Id., p. 1 (spelling and punctuation errors in the original). (R. p. 8.)

Regarding the claim that counsel failed to bring a motion to suppress, the state argued as follows in its brief:

> Koch has claimed his attorney was ineffective for failing to file a motion to suppress the "search warrant" in the case. For the purposes of this motion, the State will assume Koch is claiming his attorney should have sought to suppress the photos and texts seized during the search of his cell phone pursuant to a warrant. ...
>
> The court must dismiss this claim because it is bare and conclusory. Koch has failed to articulate and identify *why* the warrant would have been suppressed and *how* that would have affected the outcome of the trial.

R. p. 343 (emphasis in the original).

There was a hearing on November 16, 2015. As mentioned in the course of proceedings above, the court clerk had issued a notice of hearing for a status conference at 2:45 on November 16, 2015, and then the court clerk issued an amended notice of hearing changing the hearing to "oral argument" in the body of the notice and changing the time to 2:00 PM.

At the hearing, the court explained that they were there today for oral argument on the motion for summary disposition. (Tr. p. 5.)

The prosecutor did not make any argument, but stated she would stand on her brief and apologized to the court because she thought the hearing was just a

status conference. She stated that there was an amended notice that went out, and she thought she would be able to be at an evidentiary hearing at 2:15 before another judge. She thought that because she believed the instant hearing was just a status conference because she read the notice wrong. (Tr. p. 5-6.)

The court responded "We'll have to let Mr. Koch argue at this time." (Tr. at p. 6, lns. 3-4.) The court also said that it gave a conditional notice because the Court is considering matters that were not completely raised by the state. (Tr. p. 6.)

Mr. Koch's argument was limited to the failure of his trial counsel to suppress the search warrant. Since he admitted he does not know the law, at first he was saying he did not want it suppressed, but wanted it out in the open and instead argued that his attorney failed to call into question discrepancies of the search warrant. By the end of the hearing he seemed to understand that suppression was what he wanted.

Mr. Koch's relevant verbatim argument is as follows:

> That search warrant—the only search warrant that I ever received, in fact, was issued on November 11th of 2011. That search warrant, I'm not sure where and when it came from, but my home was actually raided and I was arrested on said search warrant on November 1st of 2011. I've gone through the documents that I had in my possession before I was arrested and conversations that I've had, you know, thereafter, and there's no record in the Court's transcripts or anywhere else that the State has asked to file that search warrant that was issued ten days after my home was searched and seized. I believe that that violates my Fourth Amendment—my constitutional right against illegal search and seizure, and, therefore, any evidence that was admitted to the courts under that search warrant is illegal, and any testimony or interviews that were given as a result of that would have been fruit of the poisonous tree act and they would not be admissible. And, therefore, any testimony that the police officers from the Meridian

Police Department came forward and gave would not be admissible either because the foundation for the evidence that was entered into this court case against me was based on that search warrant being brought in.

It seems to me I recall the prosecutor handing that search warrant to the bailiff and having him hand it to you. You looked it over and it was handed to Detective McGilvery on the stand and he was asked to verify it that was the search warrant he obtained to serve on my house and if it was dated November 1st of 2011 and he testified that it was.

If the State has another search warrant that they would like to provided me with at this time that says that there was one valid on 2011, November 1, I would be happy to see it.

Tr. p. 6, ln. 18—p. 8, ln. 6.

The state's response was as follows:

Your Honor, I believe that I've already addressed his argument regarding the motion to suppress as bare and conclusory and I would rest on my comments in the brief. Thank you.

Tr. p. 8, lns. 8-12.

The court asked if anything further. Mr. Koch continued:

If that document that I received gives me more time to look it over—I mean, I don't understand. If we're here to have oral argument about it, I'm explaining what the situation is on the search warrant and there is nothing bare and conclusory about that unless the State has another search warrant they want me to view at this time.

I would ask the Court to take into consideration at this point that that search warrant that was served on my home and seized my property and I was arrested under was also taken to the grand jury and the evidence was submitted against me at grand jury, from what I can gather, and the grand jury indictment was handed down thereafter and I was charged after that.

So as far as I can see—I understand that the documents that were submitted may be bare and conclusory, but I never asked for that subpoena to be suppressed. I asked—my comment was that my attorney failed to call into question the discrepancies of the search warrant.

THE COURT: But it sounds to me like, Mr. Koch, you are suggesting that a motion to suppress should have been filed.

MR. KOCH: No, ma'am, I don't want it suppressed. They took that search warrant to my house. I want it out in the open. I want the evidence dismissed.

THE COURT: All right. So would you concede that a motion to suppress should not have been filed?

MR. KOCH: Well, there wouldn't be any evidence to—there shouldn't have been any grand jury indictment handed out based on that search warrant, is what I'm saying. If I'm out of line by saying that it shouldn't have been suppressed, I don't know because I don't know the law. But what I do know is there was a search warrant that I was given that was administered or issued 10 days after I was arrested and it was taken to the grand jury and indictments were handed down and that's where the charges came from that I was actually charged with.

Your Honor opened up my court case by reading the grand jury indictment against me. And the evidence that I gather from--I saw one photo in the grand jury transcripts or whatever of a piece of equipment that was taken from my home. That is how I know they took the evidence out of my house to grand jury to get an indictment out of this.

Now, if you're telling me that that means I'm asking for the search warrant to be suppressed, I don't really know. I'm just merely telling you that the search warrant was not valid 10 days before it was issued. I understand that when a search warrant is issued it's good for a matter of, I think, 30 days, but that would be from the date it was issued forward, not from the day it was issued backwards.

Tr. p. 8, ln. 14—p. 10, ln. 24 (emphasis added).

At the end of the hearing the court said it would take the matter under advisement and issue a written opinion. (Tr. p. 11.)

Three days later, on November 19, 2015, the court signed its Order Dismissing Petition and it issued the next day. The court held Mr. Koch failed to provide any evidence supporting his claims. (R. p. 368.) It also held that even

assuming his factual allegations are true for several other claims, he failed to show prejudice. (R. p. 369.) Most importantly, the court ruled as follows regarding counsel's failure to bring a motion to suppress:

> Koch also claims ineffective assistance of counsel because his counsel failed to file a motion to suppress. (While he repeatedly stated at the oral argument he was not suggesting a suppression motion should have been filed, in reality that is what he is arguing.) In cases like this, where the asserted deficiency on the part of counsel consists of a failure to pursue a particular issue, which even if pursued would not have afforded a basis for relief, the Court will reject any ineffective assistance of counsel claim. [internal citations omitted] While, Koch introduced no evidence to support his claims, the Court carefully reviewed the record in underlying case by reviewing the trial transcript and finds that even if his attorney had filed a motion to suppress, he would have been unsuccessful. *He identified no suppression issues in his Petition. He also failed to provide a copy of the search warrant.* A party moving to suppress evidence has the threshold burden of showing that his legitimate privacy interests have been infringed. [internal citations omitted] Not only has Koch failed to identify any basis to suppress the evidence found as a result of the search warrant, Koch has simply not established that the outcome of the court proceeding would have been different.

Order Dismissing Petition at p. 7 (underlined emphasis in the original, italicized emphasis added). (R. 369.)

D. The Court Erred in Summarily Denying the Petition

1) Petitioner did not receive his full 20 days to respond to the notice of intent to dismiss

Petitioner asserts that the district court erred in summarily denying the petition for post-conviction relief. First, the court did not give Mr. Koch the required 20 days to respond to the notice of intent to dismiss.

Idaho Code § 19-4906 provides as follows in relevant part:

> (b) When a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing. The applicant shall be given an opportunity to reply within 20 days to the proposed dismissal. In light of the reply, or on default thereof, the court may order the application dismissed or grant leave to file an amended application or, direct that the proceedings otherwise continue. Disposition on the pleadings and record is not proper if there exists a material issue of fact.

I.C. section 19-4906(b).

As the Supreme Court explained in *Garza v. State*, 139 Idaho 533, 82 P.3d 445 (2003), *overruled in part* by *Verska v. St. Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 265 P.3d 502 (2011), the 20 day period is to give the Petitioner an opportunity to submit an amended application to cure a defect in the petition.

In this case, the procedural posture was particularly confusing. On September 28, 2015, the state brought a motion for summary dismissal. On October 19, 2015, the court *sua sponte* set a hearing for it for November 16, 2015. However, the notice first stated it was for a status conference and then the amended notice of hearing changed not only the time, but also inserted into the body "oral argument." At the hearing, the prosecutor admitted she thought the hearing was just a status conference. It was the court that said that the hearing was on the motion for summary disposition.

Also, on October 27, 2015, the court issued its notice of intent to dismiss because it expanded on the state's grounds for summary dismissal and instructed that the Petitioner could respond within 20 days. At the hearing the

pro se Petitioner made the comment that he did not understand if that document (the notice of intent to dismiss) gave him more time.

Significantly, the court did not tell him he did have more time (or anything else about the time frame). (Tr. p. 8.) Rather, at the end of the hearing the court said it would take the matter under advisement and issue a written opinion. (Tr. p. 11.) Given all this, it would not be reasonable for a petitioner to believe that he still had a chance to respond even assuming arguendo that the court would accept further response.

The notice of intent to dismiss was filed on October 27, 2015, but mailed to Mr. Koch on October 28, 2015. Adding three days for mail pursuant to I.R.C.P. 2.2(c) he actually should have had until the day after the hearing to correct any defect in his application.

In short, Mr. Koch did not receive his full 20 days to respond to the notice of intent to dismiss. Based on the district court's comments, Mr. Koch's opportunity to respond to the notice of intent to dismiss ended at the end of the hearing. The court said it was taking it under advisement and was going to issue a written decision. Mr. Koch was not told he still had time to provide further response even though he inquired regarding it.

Accordingly, since the district court did not comply with the statutory time frame, the order dismissing petition must be reversed and remanded to the district court to give Mr. Koch a full opportunity to respond.

2) Petitioner raised a material fact issue regarding the search warrant so an evidentiary hearing was required

While Mr. Koch's written petition may not have fully illuminated his complaint about the search warrant, his argument to the court during oral argument certainly did. Mr. Koch's point was that the search warrant for his house (not his cell phone) was dated November 11, 2011, but the search took place on November 1, 2011. In short, his allegation was that the search warrant was actually issued after the fact and so the search was warrantless.

The state did not produce any contrary evidence, and in fact, did not even make a responsive argument since in its brief it was discussing a cell phone warrant. Even after the state was alerted to exactly what Mr. Koch was talking about it still made no responsive comment and just referred back to its brief which discussed the wrong search warrant. In short, there was actually nothing in the record that disputed his allegations.

The court in its order of dismissal complained that Mr. Koch did not produce the search warrant. Significantly, the court's earlier notice of intent to dismiss did not specify that the search warrant needed to be produced. Since as an inmate Mr. Koch presumably did not have the warrant or access to it or else he would have attached it, had the court alerted Mr. Koch of his need to produce the warrant he could have explained his situation to the court. At that point, the court could have ordered the state to produce it, which it actually should have

already under I.C. section 19-4906(a) since it is clearly material to the issue.[1]

Further, given what the court learned at the hearing it should not have summarily dismissed the motion to suppress issue, but set an evidentiary hearing to go along with the state's production of the warrant.

The production of the search warrant aside, there was no evidence disputing Mr. Koch's statement, including his sworn statement in his affidavit, that the search warrant for his home was dated November 11, 2011, and that the search of his home occurred before this, on November 1, 2011. Taking this as true, as the court must at this stage of the proceedings, Mr. Koch's attorney's failure to bring a motion to suppress the warrant was deficient performance.

Mr. Koch also described the prejudice, including that the interviews taken pursuant to the search warrant and the physical evidence which the state argued corroborated the victim's story, would have been suppressed as well as fruit of the poisonous tree.[2]

Quite frankly, the court's order dismissing petition is completely unresponsive to Mr. Koch's arguments and does not address them in any way. In fact, the ruling in the order dismissing petition is exactly the same as that same section in the notice of intent to dismiss with the notable exception that the sentence "[h]e also failed to provide a copy of the search warrant" is added to the final order issued after the hearing. (R. p. 359, 369.)

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[1] The state did not even produce the wrong search warrant along with its answer which should have been done as material by I.C. section 19-4906(a).

[2] The trial transcript which is part of our record makes it clear that the interviews would include his wife and daughter and the sexual nature of the piece of evidence he was discussing.

The order dismissing petition repeatedly says that he failed to identify any basis to suppress the evidence found as a result of the search warrant. This is not true -- a warrant being issued days after the fact means there was no valid warrant to search the house which is a Fourth Amendment violation.

To conclude, the district court should have held an evidentiary hearing on the issue of whether a valid warrant existed at the time of the search of the residence as well as the prejudice arising from trial counsel's failure to move to suppress the illegally seized evidence and the fruit of the poisonous tree.

CONCLUSION

Wherefore, for the reasons as stated above, Appellant/Petitioner respectfully requests that the district court's order summarily dismissing his petition for post-conviction relief be reversed and vacated and the matter remanded to the district court so that Appellant can have a full chance to respond to the notice of intent to dismiss, or in the alternative, that the order dismissing the motion to suppress search issue be reversed and remanded to the district court for an evidentiary hearing.

DATED this 16th day of July, 2016.

Greg S. Silvey
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of July, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF by emailing it to the Idaho Attorney General at ecf@ag.idaho.gov

Greg S. Silvey